IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 381 of 1998

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

PANKAJKUMAR BHURABHAI THAKKAR

Appearance:

MR ND GOHIL, APP, for Petitioner

RULE SERVED for Respondent No. 1

MR VASANT S SHAH for Respondent No. 3, 4, 5, 6

Also MR AKSHAY MEHTA for Resps. 3, 5.

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 18/04/2000

ORAL JUDGEMENT

1. This is a revision application under section 397 and 401 of the Criminal Procedure Code at the instance of the State of Gujarat, challenging the order of discharge passed by the learned Magistrate in Criminal Case

No.182/98 in respect of the original six accused.

2. The criminal case arose from a product manufactured by original accused no.6 viz. Nestle India Limited. The other accused are stockists, distributors, retailers and directors of the said company.

3. The product which is the subject matter of the controversy carries the brand name of "Cerelac". It is branded, manufactured and sold as instant milk cereal. The label further contains a statement "Wheat apple - weaning food".

4. The Food Inspector inspected the shop of the accused no.1, collected a sample of cereal (instant milk cereal), and sent the sample to Public Analyst for analysis. The report of the Public Analyst states that the sample complies with provisions of Rule 37-B(2)(i) to (ix) of the Prevention of Food Adulteration Rules, 1955, but does not comply with Rule 37-B(1), inasmuch as there is a large picture of an infant and three smaller pictures of infants on the label of the container. On the basis of the complaint learned Magistrate issued process and accordingly the Criminal case came to be filed.

5. In the said criminal case the accused filed an application Exh.7 setting out their contentions in detail therein and prayed for a discharge in their favour on the ground that even on a prima facie basis no offence under Rule 37-B could be made out.

6. After hearing the parties the learned Magistrate was pleased to allow the application Exh.7 and passed an order of discharge in favour of the accused. Hence the present revision by the State.

7. In order to appreciate the controversy in the correct perspective it is first necessary to bear in mind the relevant statutory provisions. Rule 37-A of the Prevention of Food Adulteration Rules 1955 reads as under:

"37-A Manufacture of proprietary foods and infant food:- (1) An article of infant food whose standards are not prescribed in Appendix `B', shall be manufactured for sale, exhibited for sale or stored for sale only after obtaining the approval of such article of food and its label from Government of India.

(2) In case of proprietary foods, the name of the food or category under which it falls in these rules shall be mentioned on the label.

Explanation - For the purpose of this rule-

(a) `Infant food' means any food which may be used for partial or total replacement of breast milk, commonly called breast milk substitute and includes infant milk food, infant formulae and any food suitable as a complement to breast milk, to meet the nutritional needs of the infant after 4 months of age, commonly called `complementary food', `breast milk supplement' of `weaning food'.

7.1 Rule 37-B reads as under:

"37-B Labelling of infant foods - Restriction on use of words or pictures on labels of Infant foods:

(1) The package and/or the advertisement of infant milk food, infant formula and any other special infant food marketed as breast milk substitutes, shall not have a picture of infant or picture of mother breast feeding infant or other forms of pictures or text which may idealise the use of such product. The terms `Humanised' or `Maternalised' or similar expressions shall not be used.

The package and/or the label and/or the advertisement of infant food shall also not use the word `Full Protein Food', `Complete food' or `Health food' or similar expressions."

7.2 It must be distinctly understood that Rule 37-A and Rule 37-B operate in slightly different fields.

7.3 Rule 37-A generally deals with the manufacture of proprietary foods and infant food. As can be seen from explanation (a) infant food would include infant milk food, infant formula and any food suitable as a complement to breast milk. On the other hand, Rule 37-B concerns itself mainly with the labelling of infant foods and restrictions on the use of words on the label or pictures on the label of such infant foods.

7.4 Even a plain reading of Rule 37-B(1) indicates

that the restriction as to pictures or text applies to "infant milk food, infant formula and any other special infant food marketed as breast milk substitutes." On a plain reading of Sub-rule (1) of Rule 37-B in the context of explanation (a) to Rule 37-A makes it clear that "infant food" includes infant milk food, but all and any "infant food" is not necessarily infant milk food. In other words, an infant food may have milk as a component, may have milk with other components or conceivably may not have milk as a component at all and nevertheless be an infant food within the meaning of explanation (a).

7.5 On the other hand, sub-rule (1) of Rule 37-B does not apply to any and all "infant foods", but applies only to infant milk food, infant formula and any other special infant food marketed as breast milk substitutes. These three categories viz. infant milk food, infant formula and any other special infant food are, in the context of sub-rule (1), required to be read in conjunction with each other because of the presence of the conjunction "and" used in the phrase, and also because the concept of marketing is considered not in the singular, but in plural viz. marketed as breast milk substitutes. If any of these categories are marketed as breast milk substitutes, the prohibition imposed by Rule 37-B applies with full force, but not otherwise.

7.6 Firstly it is nobody's case including that of the prosecution that the product in question is marketed as a breast milk substitute. On the contrary the label clearly indicates that it is a "weaning food" i.e. it is a complement or supplement to breast milk. Obviously any product which is a complement or supplement to breast milk cannot possibly be treated as a substitute for breast milk. Certainly it is not the prosecution case that the product contains any printing or any other indication on the label that it is marketed or professed to be marketed or professed to be "breast milk substitute".

8. For the reasons aforesaid, I am of the view that Rule 37-B has no application to the product in question. It is pertinent to note that this very product manufactured by this very company was considered in the context of Rule 37-B by the Orissa High Court in the case of Nestle India Ltd. Vs. A.K. Chand, reported at 1995 Cri. L.J. 3053. The Orissa High Court also concluded, albeit for different reasons, that this very product manufactured by this company is a cereal based infant food not marketed as breast milk substitute and therefore does not contravene Rule 37-B.

9. A note is also required to be taken of a letter dated 14th February 1992 by the Director General of Health Services wherein it is stated that weaning food is not covered by infant milk food, infant formula, and other special infant food marketed as breast milk substitutes.

10. In the premises aforesaid, the order of discharge passed by the learned Magistrate is eminently sustainable and does not require any interference in the present revision. This revision i
is discharged.

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